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No. 94-1070

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

GENERAL ELECTRIC COMPANY, *et al.*,
Petitioners,
v.
PATRICIA INGRAM, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR ALUMINUM COMPANY OF AMERICA, AMGEN INC., EASTMAN KODAK COMPANY, EXXON COMPANY, U.S.A. (A DIVISION OF EXXON CORPORATION), GENENTECH, INC., JOHNSON & JOHNSON, MERCK & CO., INC., THE PROCTER & GAMBLE CO., THE SHERWIN-WILLIAMS COMPANY, AND USX CORPORATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

If a district court excludes scientific expert testimony as unreliable under the Federal Rules of Evidence as clarified by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, —— U.S. ——, 113 S. Ct. 2786 (1993), is it proper for a reviewing appellate court to apply (as the Third Circuit did in this case) a stringent "hard look" standard that amounts to virtual *de novo* review?

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Amici curiae respectfully pray that this Court grant Petitioners' Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit. *Amici* have obtained consent from all parties to file this *amicus* brief. Correspondence evidencing consent has been provided to the Clerk of this Court.[1]

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[1] Petitioners are General Electric Company, National Railroad Passenger Corporation, the City of Philadelphia, Southeastern

INTEREST OF *AMICI CURIAE*

Amici are ten American companies engaged in a wide variety of industrial activities. They include manufacturers of steel, pharmaceuticals, soaps and detergents, petroleum products, imaging equipment and supplies, chemicals, paints and coatings, consumer goods, aluminum, and other products that are a large and vital part of our national economy. The names of most of the *amici* have long been familiar to virtually all Americans. Also included, however, are Amgen Inc. and Genentech, Inc., two relatively new companies that are leaders in using innovative genetic engineering technology to produce pharmaceuticals.

Collectively, *amici* represent the backbone of American industry, both now and for the future. Their total sales in 1993 amounted to well over $100 billion, and during the course of their various histories they have applied for tens of thousands of patents.

All of these companies face the threat of speculative litigation based on expert scientific testimony that falls far short of the standards scientists themselves use in evaluating the validity of their work, and this threat has serious consequences. When "science" for courtroom purposes diverges from scientific methods and principles, companies sometimes pay for injuries or damages they did not cause. Their customers pay too; prices go up and

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Pennsylvania Transportation Authority, Monsanto Company, American Premier Underwriters, Inc., and the Budd Company. Respondents are Westinghouse Electric Corporation, Mabel Brown, George Burrell, Priscilla Burrell, Amber Burrell, Monica Hilton, Wallace D. Cummins, K. Louise Jones, Harvey Jones, James Lament, Christopher Brown, Jacqueline Michelle Brown, Cathlene Brown, Craig Brown, Margherita Barbetta, Mary Retta Johnson, Celeste Brown, Clemmon Brown, Cloyd Brown, Curtis Brown, John Ingram, Sr., John Ingram, Jr., Patricia Ingram, April Ingram Robinson-Ray, Mary Alice Knight, William Butler, Theresa Butler, Bryan Jackson, Allen Simpson, Donald Simpson, Karen Simpson, Marvin Simpson, Matthew Cunningham, and Bessie Cunningham.

some products are never developed or never brought to market.

Like countless other American companies, *amici* must try to make rational business decisions knowing full well that irrational and unpredictable litigation may result. When plaintiffs find experts willing to testify in court about conclusions their scientific colleagues would quickly reject as unfounded and unsupported, juries may reach verdicts completely at odds with reality. Even if jurors sometimes do see through the charade, it is unreasonable and unfair to put companies through the cost of defending claims that are so speculative. The solution, recognized by this Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, —— U.S. ——, 113 S. Ct. 2786 (1993), is for trial judges to review scientific expert testimony carefully and to exclude it when it is unreliable.

Amici are concerned about this case because the Third Circuit has announced a new "hard look" standard of review that discourages district courts from following this Court's mandate in *Daubert* to review and control disputed expert testimony. The Third Circuit's standard amounts to virtual *de novo* review, but it applies only if the trial court excludes expert evidence. Because this one-way "hard look" is at odds with *Daubert*, this case affords an important opportunity to reinforce *Daubert*'s message that federal trial judges must act as gatekeepers to assure both the reliability and relevancy of expert evidence, and to make clear that when a judge conducts detailed evidentiary hearings and explains his or her ruling, a decision to exclude this kind of evidence should be reversed only if manifestly erroneous.

STATEMENT OF THE CASE

The Plaintiffs (here Respondents) in this case lived near a railroad yard located in Paoli, Pennsylvania, a few miles west of Philadelphia. They claimed they had been exposed to PCBs (polychlorinated biphenyls) from the yard, and that this exposure had caused a variety of

physical ailments, and/or had increased their risk of disease.

As explained in detail by the Petitioners in their Petition for a Writ of Certiorari, in 1988 the District Court held the Respondents' expert testimony inadmissible and granted the Petitioners' motion for summary judgment. *In re Paoli R.R. Yard PCB Litig.*, 706 F. Supp. 358 (E.D. Pa. 1988). The Third Circuit reversed and remanded to the District Court with instructions to review scientific evidence issues in greater depth, and to explain more fully its rulings on these issues. *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829 (3rd Cir. 1990), *cert. denied sub nom. General Elec. Co. v. Knight*, 499 U.S. 961, 111 S. Ct. 1584 (1991).

On remand, the trial judge followed the Appellate Court's instructions by conducting extensive hearings on the disputed evidence. In several unpublished but exhaustively detailed opinions the District Court again held this evidence inadmissible and again granted summary judgment.[2] Despite this thorough evaluation and analysis by the trial judge, the Appellate Court undertook a virtual *de novo* review and reversed several of his evidentiary rulings. *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717 (3d Cir. 1994).[3] To justify this extensive reanalysis of the excluded evidence the Third Circuit created a new "hard look" standard, which is unique not only because of the more stringent review it entails, but also because it applies only if expert evidence is excluded. *Id.* at 750.

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[2] These opinions are reprinted in Part II of the Appendix filed by Petitioners with their Petition for a Writ of Certiorari.

[3] The Third Circuit's opinion in the Federal Reporter is almost 70 pages long. More than half of it is devoted to a detailed expert by expert review of the scientific evidence. The exhaustive preliminary review conducted by the trial court on remand was not criticized in any way as improper or inadequate. The Court of Appeals did not disagree with the procedure or scope of the evidentiary hearing, but focused instead on a number of the factual conclusions the District Court reached about the testimony that was presented.

SUMMARY OF ARGUMENT

The Third Circuit's one-way "hard look" is at odds with this Court's mandate in *Daubert* that district judges act as evidentiary gatekeepers to assure the reliability, relevancy and helpfulness of expert scientific evidence. *Daubert* specifies that to accomplish this task trial judges must undertake a preliminary assessment of whether the reasoning or methodology underlying an expert's testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts at issue.

This Court's opinion in *Daubert* implicitly but clearly recognizes that trial judges are in the best position to make well-informed evaluations of scientific evidence and to determine its admissibility. The message that district judges must review and control expert testimony is unambiguous, and judges have heeded it in the vast majority of post-*Daubert* cases. Virtual *de novo* appellate reexamination after a proper preliminary review by a trial court will only discourage further progress in putting *Daubert* into practice.

The "hard look" conflicts not only with *Daubert*, but with the standard of review applied by every other Circuit that has addressed the admissibility of expert evidence since this Court's decision in *Daubert*. The Appellate Court's opinion in this case also conflicts with long-standing precedent from this Court favoring the "manifestly erroneous" standard for appellate review of trial court rulings on the admissibility of such evidence, and with the widely held view, predating *Daubert*, that a trial court is in a better position to gauge the quality of expert testimony than an appellate court. If a trial court conducts a proper review of expert evidence, as the District Court did in this case, its ruling should be reversed only if manifestly erroneous.

REASONS FOR GRANTING THE PETITION

I. THE THIRD CIRCUIT'S "HARD LOOK" STANDARD CONFLICTS WITH THIS COURT'S RULING IN *DAUBERT*.

The one-way "hard look" conflicts with this Court's mandate in *Daubert* that trial judges must assure the reliability, relevancy and helpfulness of expert evidence. The Third Circuit's concern that trial judges might misunderstand the reliability standard of Fed. R. Evid. 702 and 703 essentially ignores *Daubert's* clarification of these rules and the role of trial judges in applying them. The Third Circuit's concern is further belied by numerous post-*Daubert* district and appellate court opinions indicating that federal judges generally understand this Court's ruling very well. More information has been brought to bear in deciding the admissibility of disputed expert testimony, and more informed decisions have resulted.

A. *Daubert* Requires Trial Courts to Review Disputed Scientific Evidence to Assure That It Constitutes Valid and Relevant Scientific Knowledge.

Daubert's central teaching is the almost tautologically simple rule that when an expert testifies about science, his or her testimony must in fact constitute valid scientific knowledge that is relevant to the case at hand. This requirement is found in Rule 702, which allows expert opinion testimony only when it pertains to "scientific, technical, or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue." *Daubert* makes clear that "[t]he adjective 'scientific' implies a grounding in the methods and procedures of science. Similarly, the word 'knowledge' denotes more than subjective belief or unsupported speculation."[4] Requiring "that an expert's testimony per-

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[4] *Daubert*, 113 S. Ct. at 2795.

tain to 'scientific knowledge' establishes a standard of evidentiary reliability." [5]

Daubert further teaches that in accordance with Rule 104(a), trial court's are to determine "at the outset" whether an expert is proposing to testify about scientific knowledge that will assist the trier of fact,[6] and it teaches that trial judges are to serve as gatekeepers in accomplishing this task.[7] Neither the *Daubert* standard nor the obligation of courts to apply it is ambiguous. *Daubert* also explicitly approves the application of Rule 403 to control otherwise admissible evidence that might cause undue delay or confusion if presented to a jury.[8]

This analytical framework clearly places the burden of implementation on trial courts. It is based on the premise that the law "must resolve disputes finally and quickly," [9] and it anticipates and accepts the consequences that exclusion "on occasion will prevent the jury from learning of authentic insights and innovations. That . . . is the balance that is struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes." [10]

B. Federal Courts Should Not Be Discouraged from Continuing the Progress They Have Made Under *Daubert*.

Published decisions demonstrate overwhelmingly that district courts understand *Daubert's* mandate, and that they know how to put it into practice. They have responded by conducting more in-depth and detailed evaluations of disputed expert testimony. *See, e.g., Chikovsky v.*

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[5] *Id.*

[6] *Id.* at 2796.

[7] *Id.* at 2798.

[8] *Id.*

[9] *Id.*

[10] *Id.* at 2799.

Ortho Pharmaceutical Corp., 832 F. Supp. 341 (S.D. Fla. 1993) (excluding testimony linking mother's use of acne medication to daughter's birth defects because this conclusion was unsupported by data or published studies); *Virgin Islands v. Penn*, 838 F. Supp. 1054 (D. V.I. 1993) (DNA evidence admitted in rape case after court conducted thorough review of a variety of scientific issues); *Gier v. Educational Serv. Unit No. 16*, 845 F. Supp. 1342 (D. Neb. 1994) (limiting expert psychiatric and psychological testimony because experts had relied on standardized checklists that were not valid for the plaintiffs, who were retarded); *Joiner v. General Elec. Co.*, 864 F. Supp. 1310 (N.D. Ga. 1994) (plaintiffs' expert testimony on causal link between lung cancer and exposure to PCBs excluded); *Hein v. Merck & Co., Inc.*, —— F. Supp. ——, 1994 WL 661834 (M.D. Tenn. 1994) (carefully reviewing testimony of expert on hedonic damages and excluding it after considering factors listed in *Daubert* as well as other factors). *Cf. Meyerhoff v. Michelin Tire Corp.*, 852 F. Supp. 933 (D. Kan. 1994) (holding expert testimony about a warning label was insufficient to prove the label was inadequate); *Richardson v. United States*, 835 F. Supp. 1236 (E.D. Wash. 1993) (in a non-jury case the court ruled that neither party's expert testimony on accident reconstruction had been of any assistance).

This Court's message on gatekeeping was clear, and it has been understood. District courts have begun to conduct "*Daubert* hearings,"[11] and to use a number of available tools in innovative ways to improve their ability to address scientific issues.[12] Hearings and other proce-

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[11] *E.g. Gier v. Educational Serv. Unit No. 16*, 845 F. Supp. 1342 (D. Neb. 1994). *See also* Klein, *The Revolution in Practice and Procedure:* "Daubert *Hearings*", 1 Shepard's Expert & Sci. Evidence Q. 655 (1994).

[12] *See generally* Black et al., *Science and the Law in the Wake of* Daubert: *A New Search for Scientific Knowledge*, 72 Tex. L. Rev. 715, 786-802 (1994).

dures for enhancing the knowledge of trial judges take time, but "on balance, they will save time . . . [and] promote judicial economy." [13] These improvements will quickly come to naught, however, if appellate courts undertake virtual *de novo* review, as the Third Circuit did in this case.

Federal appellate opinions that have addressed district court *Daubert* rulings support the proposition that if a proper preliminary hearing is conducted, a trial court's ruling should be reversed only if manifestly erroneous. *See, e.g., Bradley v. Brown,* —— F.3d ——, 1994 WL 696303 (7th Cir. 1994), a pesticide exposure toxic tort case in which the Seventh Circuit affirmed a ruling excluding expert medical testimony about multiple chemical sensitivity disorder. Having concluded that the trial court had followed the framework set forth in *Daubert,* the appellate court in *Bradley* reviewed its factual findings only to determine if they were manifestly erroneous.

The Third Circuit's "hard look" is thus diametrically at odds with *Daubert* and with the way in which other courts have applied *Daubert.* It defies logic and common sense for a trial court to be put through the painstaking effort that *Daubert* requires only to face being second-guessed if the judge decides to exclude the evidence at issue. It is also manifestly unfair to defendants to force them to prove inadmissibility a second time, and in a forum where it is more difficult to present all the facts bearing on this issue.

Appellate courts, which do not have the benefit of all the information available to trial judges, should not rush to reverse detailed factual findings, nor should they deter exclusion of expert testimony with the threat of a special "hard look" standard of review applicable only if the evidence is excluded. If allowed to stand, the Third Cir-

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[13] Klein, *supra* note 11 at 660.

cuit's one-way "hard look" approach will only undermine this Court's ruling in *Daubert* and discourage trial judges from continuing to follow its mandate to act as gatekeepers.

II. THE THIRD CIRCUIT'S "HARD LOOK" STANDARD CONFLICTS WITH EVERY OTHER CIRCUIT THAT HAS ADDRESSED EXPERT TESTIMONY UNDER *DAUBERT* AND WITH PRE-*DAUBERT* PRECEDENT.

The "hard look" standard of review applied by the Third Circuit to the District Court's evidentiary rulings in this case puts it at odds with every other Circuit that has considered the issue since *Daubert*. The "hard look" is also at odds with this Court's pre-*Daubert* guidance for appellate review of rulings on the admissibility of expert evidence, and with the accepted common sense rule that when a trial court properly considers the issue of admissibility, extensive appellate review is not required.

A. The "Hard Look" Standard Conflicts with Other Circuits' Post-*Daubert* Rulings.

This Court's decision in *Daubert* clarifies the Federal Rules of Evidence that govern expert testimony, but does not expressly address the standard for appellate courts to apply when reviewing district court rulings on the admissibility of such evidence. In the year and a half since *Daubert*, however, eleven Circuits have addressed this issue,[14] and except for the Third Circuit they have all continued to apply either the "manifestly erroneous" or the "abuse of discretion" standard.[15]

The Fifth Circuit, for example, has held that "[a] trial court's ruling regarding admissibility of expert testimony

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[14] As yet there is no decision on point from either the Federal Circuit or the Eleventh Circuit.

[15] Petitioners discuss this issue in detail in their Petition for a Writ of Certiorari, at 12-15.

is protected by an ambit of discretion and must be sustained unless *manifestly erroneous.*" *Rosado v. Deters,* 5 F.3d 119, 124 (5th Cir. 1993) (emphasis added), *quoting Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106, 1109 (5th Cir. 1991), *cert. denied,* —— U.S. ——, 112 S. Ct. 1280 (1992). The trial court in *Rosado* had refused to allow the plaintiffs' accident reconstruction expert to testify, and the Fifth Circuit affirmed, citing *Daubert* for the proposition that Rule 702 clearly contemplates regulation of expert evidence. *Id.* at 124 n.9; *accord, United States v. McCaskey,* 9 F.3d 368, 379-80 (5th Cir. 1993), *cert. denied* —— U.S. ——, 114 S. Ct. 1565 (1994) (holding that sentencing court's acceptance of expert testimony on composition of cocaine found in defendant's possession was not clearly erroneous).

A number of cases from the Ninth Circuit illustrate the "abuse of discretion" standard. In *United States v. Jones,* 24 F.3d 1177 (9th Cir. 1994), for example, the Court followed this rule (and *Daubert*) in affirming the trial judge's rejection of the defendant's expert voice identification evidence. *See also United States v. Quinn,* 18 F.3d 1461, 1464-65 (9th Cir.), *cert. denied,* —— U.S. ——, 114 S. Ct. 2755 (1994) (citing *Daubert* and applying "abuse of discretion" standard in affirming acceptance of photogrammetry evidence); *United States v. Rincon,* 28 F.3d 921, 923-26 (9th Cir.), *cert. denied,* —— U.S. ——, 115 S. Ct. 605 (1994) (citing *Daubert* and applying "abuse of discretion" standard in affirming rejection of expert testimony concerning the reliability of eyewitness identifications).[16]

Only the Third Circuit has deviated from the approach traditionally taken by federal appellate courts in reviewing

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[16] *See also Claar v. Burlington N. R.R. Co.*, 29 F.3d 499, 500-502 (9th Cir. 1994) (applying "manifestly erroneous" standard and citing *Daubert* in affirming trial court's rejection of expert affidavits offered in opposition to summary judgment in a chemical exposure toxic tort case).

a trial court's rulings on the admissibility of expert testimony. Its one-way "hard look" rule is contrary to at least ten other Circuits' post-*Daubert* holdings. It is also contrary to pre-*Daubert* precedent.

B. The "Hard Look" Standard Conflicts with Pre-*Daubert* Precedent.

In cases preceding *Daubert* this Court established that a trial judge's decision to admit or exclude expert evidence "is to be sustained unless manifestly erroneous." *Salem v. United States Lines Co.*, 370 U.S. 31, 35, 82 S. Ct. 1119 (1962). The *Salem* opinion cited with approval to *Spring Co. v. Edgar*, 99 U.S. 645, 658 (1879), which held that

> Cases arise where it is very much a matter of discretion with the court whether to receive or exclude the evidence; but the appellate court will not reverse in such a case, unless the ruling is manifestly erroneous.

Indeed, most pre-*Daubert* courts took this approach, and for good reasons that *Daubert* reinforces. As Judge Weinstein and Professor Berger have stated in their treatise, decisions about the admissibility of expert testimony require detailed, case-by-case analysis, and trial judges therefore must be accorded broad discretion in deciding to admit or exclude it. 3 J. Weinstein & M. Berger, WEINSTEIN'S EVIDENCE ¶ 702(2) at 22-23 (1993). If a court undertakes a proper review, its ruling on admissibility should be reversed only if manifestly erroneous. *See, e.g., In re Air Crash Disaster at New Orleans, Louisiana*, 795 F.2d 1230, 1233 (5th Cir. 1986) (manifestly erroneous standard reflects the superior opportunity of the trial judge to evaluate expert competence and helpfulness of testimony).

Daubert, which specifically mandates more detailed trial court review of disputed expert evidence than in the past, can hardly be understood as having reduced the discretion accorded trial judges. Precedent, both before and

since *Daubert*, thus supports review of evidentiary rulings under the manifestly erroneous standard. The Third Circuit's "hard look" is contrary to long-standing precedent, contrary to *Daubert*, and contrary to the decisions of other circuits that have applied *Daubert*.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to review the Third Circuit's "hard look" heightened scrutiny standard, and to uphold the broad authority and discretion of trial courts to exclude putatively scientific evidence that does not accord with the standards used by scientists to determine scientific validity.

Respectfully submitted,

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